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IN THE COURT OF APPEALS OF INDIANA

FLORENE PATTERSON,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 71A05-0603-CV-118
	)	
UNIVERSITY PARK ASSOCIATES,	)	
	)	
Appellee-Defendant.	)	

APPEAL FROM THE ST. JOSEPH CIRCUIT COURT
The Honorable Michael G. Gotsch, Judge
Cause No. 71C01-0311-PL-511

January 24, 2007

MEMORANDUM OPINION – NOT FOR PUBLICATION

BAKER, Judge

Appellant-plaintiff Florene Patterson appeals from the trial court's order granting summary judgment in favor of appellee-defendant University Park Associates (University). In particular, Patterson argues that the affidavit designated by University in support of its motion for summary judgment is inadmissible, as is the exhibit attached thereto. Finding no error, we affirm the judgment of the trial court.

FACTS

On June 13, 2003, Patterson was walking through the common area of University Park Mall (the Mall) in Mishawaka, when she slipped and fell on a liquefied cheese substance, "which was like Cheez Whiz." Appellee's Br. p. 3. There was a high volume of traffic in the Mall on that day, and as Patterson and her daughter walked through the Mall, they were working their way through a crowd and did not see the cheese substance before she fell. Patterson did not see anyone trying to avoid the cheese before she slipped, nor did she see anyone who had just dropped it, who had cheese on their shoes, or who were tracking it with their feet.

John Simons has been employed at the Mall as a security sergeant for four years. Simons's duties include walking through the Mall to inspect the common areas for substances that could cause a customer to slip and fall. Simons was working on June 13, 2003, and between 4:19 and 4:21 p.m., Simons inspected the floor in the common area where Patterson later slipped and fell, and did not observe any substance, including cheese, that could cause a slip and fall. If Simons had seen a substance, he would have requested that

housekeeping remove it. Simons was notified after 4:25 p.m. that a customer had fallen in the area he had just walked through, and he returned to assist Patterson.

On November 10, 2003, Patterson filed a complaint, alleging that the Mall owner had negligently failed to maintain a reasonably safe walkway, resulting in injuries to her left knee, ankle, and wrist, and leading to physical limitations and "substantial" mental and physical pain and suffering.[1] Appellant's App. p. 4. On September 2, 2005, University filed a motion for summary judgment, arguing that it was excused from liability because it had demonstrated that there was insufficient time for it to have had notice that a foreign substance had endangered its invitees. Patterson's response to the motion was untimely and was stricken by the trial court on October 17, 2005.[2] Following a hearing, the trial court granted summary judgment in favor of University on January 18, 2006. Patterson now appeals.

DISCUSSION AND DECISION

I. Standard of Review

As we consider Patterson's argument that the trial court improperly granted summary judgment in favor of University, we observe that summary judgment is appropriate only if the pleadings and evidence considered by the trial court show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Owens Corning Fiberglass Corp. v. Cobb, 754 N.E.2d 905, 909 (Ind. 2001); see also Ind.

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[1] Patterson initially filed her complaint against the wrong entity, and on March 12, 2004, she filed a stipulation to substitute University as the defendant.

[2] Patterson does not appeal the trial court's order granting University's motion to strike her response to the summary judgment motion.

Trial Rule 56(C). On a motion for summary judgment, all doubts as to the existence of material issues of fact must be resolved against the moving party. Owens Corning, 754 N.E.2d at 909. Additionally, all facts and reasonable inferences from those facts are construed in favor of the nonmoving party. Id. If there is any doubt as to what conclusion a jury could reach, then summary judgment is improper. Id.

An appellate court faces the same issues that were before the trial court and follows the same process. Id. at 908. The party appealing from a summary judgment decision has the burden of persuading the court that the grant or denial of summary judgment was erroneous. Id. When a trial court grants summary judgment, we carefully scrutinize that determination to ensure that a party was not improperly prevented from having his or her day in court. Id.

II. The Simons Affidavit

Because the trial court struck Patterson's response to the motion for summary judgment, she focuses solely on University's designated evidence. In particular, she argues that the Simons affidavit contains improper conclusions and impermissibly hinges on his credibility. Additionally, she argues that Exhibit A to the Simons affidavit is improper because it is not connected to Simons, there was no foundation laid to establish its admissibility as a business record, and it was created to protect someone's interest in the face of likely litigation.

Before getting into Patterson's arguments, we observe that to prevail on a negligence claim, a plaintiff must establish a duty owed to the plaintiff by the defendant, a breach of that

duty, and an injury to the plaintiff proximately caused by that breach. McClyde v. Archdiocese of Indianapolis, 752 N.E.2d 229, 232 (Ind. Ct. App. 2001). A landowner—here, University—owes a duty of reasonable care for the protection of its invitees—i.e., the Mall's customers—while they remain on the premises. Golba v. Kohl's Dept. Store, Inc., 585 N.E.2d 14, 15 (Ind. Ct. App. 1992).

The Simons affidavit provides, in full, as follows:

> 1. I am competent to testify to the facts set forth herein and if called as a witness, would so testify to these facts.
>
> 2. The facts set forth herein are based upon my personal knowledge.
>
> 3. I have been employed at University Park Mall ("the Mall") as a security sergeant for the past four years.
>
> 4. Among my duties includes walking the mall and inspecting for substances that may facilitate a slip and fall.
>
> 5. I was on duty on June 13, 2003.
>
> 6. I inspected the common floor area in front of the Timberbox [sic] and Naturalizer stores between 4:19 p.m. and 4:21 p.m.
>
> 7. In my inspection of the area, I did not observe any substance, including cheese, that could facilitate a slip and fall.
>
> 8. After 4:25 p.m., I received a report that a customer had slipped and fallen in the common area in front of the Timberbox [sic] and Naturalizer stores.
>
> 9. After receiving the report of the slip and fall, I returned to the area to assist the customer who had fallen.
>
> 10. The substance that was on the floor had not been there when I had conducted my inspection between 4:19 and 4:21 p.m.
>
> 11. If I had seen the substance while conducting my inspection, I would have requested that housekeeping remove it.

12. Attached hereto as Exhibit A, is a true and accurate copy of the Incident Report, kept in the normal course of business and generated as a result of the customer's fall.

Appellant's App. p. 31-32.

Patterson first complains about paragraphs one and two of the affidavit, arguing that they are impermissible legal conclusions. We see no problem with either paragraph. Although attesting to one's competency and personal knowledge without any foundation may arguably be a questionable practice, here, the rest of the affidavit provides a sufficient foundation to support both conclusions. Specifically, Simons attests that he is a security sergeant at the Mall, that he routinely inspects for substances on the floor of the Mall, that he was on duty on the date in question, that he examined the area in which Patterson fell mere minutes before the accident occurred, and that the substance that was on the floor following her fall was not there at the time he conducted his inspection of the area. These statements provide sufficient foundation to conclude that Simons is competent to testify to these matters and that he has personal knowledge of the facts contained in the affidavit.

Patterson next challenges Simons's credibility, arguing that unless he has an eidetic[3] memory, it is doubtful that he would recall perfectly, two years after the event, that he had inspected the area in question between 4:19 and 4:21 on the day in question. Initially, we observe that a motion for summary judgment is an improper vehicle for determining the

[3] After our curiosity was piqued by the parties' use of this term, we learned that "eidetic" means "[o]f, pertaining to, or designating a recollected mental image having unusual vividness and detail, as if actually visible . . . ." The New Shorter Oxford English Dictionary 789 (Thumb Index ed. 1993).

weight or credibility of evidence. Scott Oil Co., Inc. v. Ind. Dep't of State Revenue, 584 N.E.2d 1127, 1130 (Ind. Tax 1992). Therefore, a summary judgment motion "cannot be defeated by an opposing party's mere incantation of lack of credibility over a supporting affidavit." Id. Moreover, while it would have been appropriate for Patterson to challenge Simons's credibility by deposing him or, at the least, by filing her own designated evidence to counter his memory of the event, she has failed to take either action. She is not now entitled to question his recitation of the facts based only upon his alleged lack of credibility. Consequently, this argument must fail.

Patterson directs us to Blinn v. City of Marion as support for her argument regarding Simons's credibility. 181 Ind. App. 87, 390 N.E.2d 1066 (Ind. Ct. App. 1979). In Blinn, the issue was whether Marion had timely posted notice of a council meeting in accordance with the Sunshine Law. In its summary judgment filing, the city included an affidavit from its mayor stating that he had been at two particular meetings at two particular times, that he had given notice, and that all required notice was given at least forty-eight hours before the meeting. On appeal, we found the mayor's affidavit to be problematic because he was biased inasmuch as he was employed by Marion, an interested party, because his statement that notice was given as required by statute was an impermissible legal conclusion, and because the affidavit was inconsistent to the extent that it put the mayor in two places at once.

None of those considerations are present in this case. First, unlike in Blinn, there is no evidence that Simons is biased. There is no evidence in the record establishing that Simons is employed by University. Indeed, Simons stated in the affidavit that he was employed as a

security sergeant at the Mall for the preceding four years. Additionally, Simons makes only short, direct, factual statements regarding his observations rather than legal conclusions. Put another way, Simons merely recited what he observed and when he observed it. Indeed, Simons does not state that the Mall had no notice that there was a substance on the floor. Rather, Simons simply states what he saw when he inspected the area at some point between 4:19 and 4:21 p.m.

Finally, unlike the circumstances in Blinn, Simons's affidavit contains no inconsistency placing him in two places at once. In fact, there are precise times and locations that show where Simons was and when he was there. In our view, Blinn is simply not supportive of Patterson's contention, and we are not compelled to conclude that there are inherent credibility problems with Simons's affidavit.

Patterson next turns to Exhibit A to the Simons affidavit, arguing that it is improper for a number of reasons. Although we disagree with Patterson's arguments with respect to Exhibit A, we will accept them for argument's sake and will not consider Exhibit A as we analyze whether summary judgment was properly granted in University's favor.

The Simons affidavit alone establishes the following facts: (1) Simons was a Mall security sergeant whose regular duties included inspecting for substances that might cause a slip and fall; (2) Simons was on duty on the day in question; (3) between 4:19 and 4:21, Simons inspected the area in which Patterson later slipped and fell and did not observe any substance, including cheese, that could cause a slip and fall; (4) after 4:25 p.m., Simons learned that a customer had slipped and fallen in the area he had just inspected; (5) upon

returning to that area, Simons observed a substance on the floor that had not been there when he conducted his inspection between 4:19 and 4:21.

Patterson directs our attention to Golba, pursuant to which she argues that the evidence contained in the Simons affidavit is insufficient to excuse University from liability. In Golba, the plaintiff was shopping in Kohl's when she stepped on a rounded object that caused her to fall. The trial court entered summary judgment in favor of Kohl's, finding that Kohl's had no actual or constructive notice of the condition that caused Golba to fall. We reversed, concluding that we could not find, as a matter of law, that Kohl's sweeping the floor once a day in the morning constituted the exercise of reasonable care for the safety of customers. 585 N.E.2d at 17 ("There is no evidence that the floor was swept immediately before Golba slipped, merely that it was swept 'earlier in the morning.'").

Here, on the other hand, based upon the evidence designated by University, we can conclude that Simons had inspected the area where Patterson slipped and fell mere minutes before her accident occurred. He observed no substance on the floor that would cause someone to slip and fall. The mall has a high pedestrian load, but the liquefied cheese was not tracked anywhere. The only reasonable inference that can be drawn from this evidence is that the cheese reached the floor mere minutes after Simons's inspection and that Patterson slipped on the cheese mere moments after it had fallen. Whereas in Golba the store swept the floor only once a day, here, Simons conducted regular inspections and inspected the area in question minutes before the accident occurred. Under these circumstances, we conclude that the designated evidence sufficiently establishes that University exercised reasonable care for

the safety of its customers and that it had no actual or constructive notice of the condition that caused Patterson to fall.[4]

The judgment of the trial court is affirmed.

VAIDIK, J., concurs.

CRONE, J., dissents with opinion.

[4] Patterson also argues that by designating certain paragraphs of her complaint for the summary judgment motion, University implicitly admitted the allegations contained therein. But as noted by University, it merely used the complaint to recount the factual and legal allegations made by Patterson. Moreover, Patterson may not rely upon the allegations contained in her complaint as evidence of University's liability or in opposition to summary judgment. Ind. Trial Rule 56(E). Finally, Patterson did not make this argument to the trial court and has, consequently, waived it on appeal. In re Estate of Highfill, 839 N.E.2d 218, 223 (Ind. Ct. App. 2005), trans. denied.

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CRONE, Judge, dissenting

I respectfully dissent. Unlike the majority, I believe that Simons's affidavit is insufficient to establish that University is entitled to judgment as a matter of law. Both the timing and the results of Simons's inspection of the common area where Patterson fell are within his peculiar knowledge, and the trial court's entry of summary judgment "forever foreclosed the opportunity to challenge [Simons's] credibility before the finder of fact." *Blinn*, 181 Ind. App. at 91, 390 N.E.2d at 1069; *see also Turner v. Town of Speedway*, 528

N.E.2d 858, 864 (Ind. Ct. App. 1988) ("Neither should summary judgment be granted when a fact, which is crucial to the outcome of the case, is within the peculiar knowledge of the moving party because the entry of judgment forever forecloses the opportunity to challenge the credibility of the declarant before the finder of fact.") (citing *Blinn*).

One can easily imagine Patterson's trial counsel having a field day with Simons's averment, made more than two years after the fact, that he "inspected the common floor area … between 4:19 p.m. and 4:21 p.m.[,]" precisely four minutes before he received a report that Patterson had fallen there. As Judge Young stated in *Blinn*,

> It is error "to base a summary judgment on the deposition of an interested party on facts, …, known only to him—a situation where demeanor evidence might serve as real evidence to persuade a trier of fact to reject his testimony." *National Aviation Underwriters, Inc. v. Altus Flying Service, Inc.*, (10th Cir. 1977) 555 F.2d 778, 784. "While we have recently emphasized that ordinarily the bare allegations of the pleadings, unsupported by specific evidentiary data, will not alone defeat a motion for summary judgment …, this principle does not justify summary relief where, as here, the disputed questions of fact turn exclusively on the credibility of movants' witnesses." *Cross v. United States*, (2d Cir. 1964) 336 F.2d 431, 433. "'Particularly where, as here, the facts are peculiarly in the knowledge of defendants *or their witnesses*, should the plaintiff have the opportunity to impeach them at a trial; and their demeanor

may be the most effective impeachment.'" *Subin v. Goldsmith*, (2d Cir. 1955) 224 F.2d 753, 758.

Blinn, 181 Ind. App. at 91-92, 390 N.E.2d at 1069 (emphasis added); *see also McCullough v. Allen*, 449 N.E.2d 1168, 1172 (Ind. Ct. App. 1983) ("[U]nder *Blinn*, it is error to base summary judgment solely on a party's self-serving affidavit, when evidence before the court raises a genuine issue as to the affiant's credibility. This is consistent with federal authority that, although 'the opposing party may not merely recite the incantation "Credibility"' to prevail, summary judgment is inappropriate if a reasonable trier of fact could choose to disbelieve the movant's account of the facts.") (citation omitted).

In this case, a reasonable factfinder could choose to disbelieve Simons's account of his inspection of the common area. Contrary to what the majority suggests, Simons is not a disinterested party—in fact, he was charged with the duty of performing the act that forms the basis of University's liability in this case. I am unpersuaded by the majority's attempts to distinguish *Blinn* and believe that if it wants to disavow that case, it should do so explicitly. Barring that eventuality, I believe that we must follow *Blinn* as controlling precedent and reverse the trial court's grant of summary judgment and remand for a trial on the merits.